Australian High Court rubberstamps detention of refugees at sea

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By a 4 to 3 vote, Australia's High Court last week upheld the Australian government's imprisonment of asylum seekers on the high seas and their forced removal to other countries, regardless of whether they face persecution. The decision gives a green light to the bipartisan drive, pursued by successive Liberal-National and Labor governments, to stop all refugees entering Australia, in flagrant violation of international law.

The majority judges dismissed a legal claim for damages for false imprisonment by one of the 157 Sri Lankan Tamil asylum seekers who were incarcerated on an Australian naval ship on the Indian Ocean for nearly a month last July. The Australian government was engaged in an ultimately unsuccessful bid to hand them back to authorities in Sri Lanka or India, from where they had fled.

The treatment of these refugees, who included 50 children, was barbaric. Not only were they denied the basic democratic and legal right to apply for asylum. For four weeks, they were crammed in a warship's windowless hull, housed in bunks stacked in rows four-high. Husbands and fathers were segregated from their wives and children, except for three hours each day when the detainees were allowed above deck for fresh air.

This unprecedented military operation was ordered by the National Security Committee of Cabinet, which consists of Prime Minister Tony Abbott and his most senior ministers. Its clear purpose was to punish the refugees for seeking to sail to Australia, and deter anyone else from attempting such a voyage, no matter how oppressive and life-threatening the conditions they are trying to escape.

The High Court, Australia's supreme court, ruled that this operation was perfectly legal under the Maritime Powers Act 2013. That legislation was introduced by the previous Labor government of Prime Minister Julia Gillard, as part of its policy of forcibly removing all arriving refugees to be detained indefinitely on Nauru or Papua New Guinea's Manus Island.

The court ruled that the protracted detention of the asylum seekers, as they were carted across the Indian Ocean to await the outcome of the Abbott government's negotiations with the Indian and Sri Lankan governments, was lawful, even though it flouted international law, including the 1951 Refugee Convention. The convention forbids signatory countries, like Australia, from punishing asylum seekers or refouling (deporting) them to any country where they face the risk of persecution.

In the words of Chief Justice Robert French, the government could imprison the refugees for "as long as reasonably necessary" to determine whether negotiations with any other country would allow them to be offloaded there. These powers do not have to be exercised "in accordance with international law," French stated.

French conceded that this incarceration had "an adverse impact upon the liberty" of the asylum seekers and potentially on their "ultimate safety and wellbeing." Nevertheless, they were not even entitled to the elementary legal principle of "procedural fairness." That is, they had no right to be heard in order to challenge their imprisonment, let alone lodge a claim for political protection.

The majority judges, mostly appointees of the Rudd and Gillard Labor governments, also left open the possibility that, if the Maritime Powers Act did not validate the government's actions, they could have been legally authorised by the federal government's vague executive and prerogative powers to "defend and

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protect the nation."

Members of the minority sounded some warnings about the open-ended scope of these powers. In a joint judgment, Justices Kenneth Hayne and Virginia Bell described the power to detain people at sea, outside Australia's territorial waters, as "exorbitant" and "counter to the normal rules of comity among civilised nations."

Hayne and Bell also pointed to "the real possibility of prolongation of detention while political and diplomatic discussions take place in the course of searching for a willing country of reception." They asked: "How long can detention be prolonged?" They objected that courts could not judge the lawfulness of such potentially limitless imprisonment.

Nonetheless, the minority judges concluded that the refugees would almost certainly be entitled only to "nominal damages" for false imprisonment, because they could have been lawfully detained by other means. This could have included removal to Manus Island or Nauru, which is in fact where the incarcerated refugees are now locked up.

Immigration and Border Protection Minster Peter Dutton welcomed the High Court verdict, saying it "vindicated" the government's position. He reiterated the government's determination to stop the arrival of all refugee boats. "We will do whatever is possible … to stop people smuggling from taking place," he told Channel Nine news.

Last year, in response to the High Court challenge, the government secured the passage of a bill designed to put its powers beyond doubt. That legislation explicitly repudiates international refugee and anti-torture law. It specifies that an asylum seeker can be removed from Australia "irrespective" of any "non-refoulement obligations" under the Refugee Convention and the Convention Against Torture.

The legislation further authorises the immigration minister to disregard Australia's "international obligations" in ordering the interception of refugee boats and the removal of their passengers to anywhere in the world.

After the High Court ruling, the government revealed, for the first time, that its military operation, labelled Operation Sovereign Borders, has forcibly turned back 15 refugee boats since being elected in September 2013, including one last December.

Operation commander Lieutenant General Angus Campbell said the forced returns included "turn-backs" using orange lifeboats into which refugees are dumped and pushed away from Australia. There were also co-ordinated transfers to "countries of origin," known as "take backs" and "various forms" of other operations.

While Labor and the Greens have made muted criticisms of some of these practices, and the military secrecy surrounding them, the High Court's ruling again underscores the fact that the basis for this anti-refugee regime was laid by the previous Labor government, which was kept in office by the Greens.

By branding asylum seekers as "illegal migrants" who must be militarily repelled, the bipartisan offensive against them seeks to divert in a reactionary xenophobic direction the intense popular opposition to the budget-cutting, growing unemployment, falling real wages and deteriorating social conditions being imposed by Liberal-National and Labor governments alike.

The overturning of international law for refugees, who are among the most vulnerable members of the global working class, also sets precedents for wider attacks on the fundamental legal and democratic rights of all working people.

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